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Holmes v. Preferred Properties, Inc., 190 Conn. 808, 462 A.2d 1057 (1983)

Michael Auger

RECENT DECISIONS

HOLMES v. *PREFERRED PROPERTIES, INC.*

In *Holmes v. Preferred Properties, Inc.*,[1] the Connecticut Supreme Court held that the provisions of section 20-325a(b) of the Connecticut General Statutes[2] were not applicable in an employment contract suit brought by an employee-real estate salesman against his employer-real estate agency for a share of commissions paid to the agency by a seller procured by the salesman.[3] The court reasoned that although listing contracts[4] are governed exclusively by section 20-325a, the plaintiff's written employment contract was an undertaking separate and apart from the defendant's listing agreement with the seller.[5] Further, the court determined that compensation due from a real estate broker to his salesman-employee is not a "commission" within the meaning of General Statutes 20-325a.[6]

The plaintiff in *Holmes* was an 82 year old licensed real estate salesman who had been in the employ of Preferred Properties from

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1. 190 Conn. 808, 462 A.2d 1057 (1983).
2. CONN. GEN. STAT. § 20-325a (1983) provides in pertinent part:
Actions to Recover Commissions Arising out of Real Estate Transactions.
(a) No person who is not licensed . . . at the time he performed the acts or rendered the services for which recovery is sought, shall commence or bring any action in any court of this state, after October 1, 1971, to recover any commission, compensation or other payment in respect of any act done or service rendered by him, the doing or rendering of which is prohibited under the provisions of this chapter. . . .
(b) No person, licensed under the provisions of this chapter, shall commence or bring any action in respect of any acts done or services rendered after October 1, 1971, as set forth in subsection (a), unless such acts or services were rendered pursuant to a contract or authorization from the person for whom such acts were done or services rendered. To satisfy the requirements of this subsection any such contract or authorization shall (1) be in writing, (2) contain the names and addresses of all the parties thereto, (3) show the date on which such contract was entered into . . . , (4) contain the conditions of such contract or authorization and (5) be signed by the parties thereto.
3. *Holmes*, 190 Conn. at 813, 462 A.2d at 1060.
4. *See infra* text accompanying n.15.
5. *Holmes*, 190 Conn. at 812, 462 A.2d at 1059.
6. *Id.* at 812-13, 462 A.2d at 1059-60.

April 1977 to October 1978.[7] Following Mr. Holmes' discharge, the defendant sold the land of a client whom Holmes had recruited. The land was sold in two separate transactions, in 1980 and 1981, for which the defendant received commissions of $18,000 and $5850, respectively.[8] The defendant also received a commission on the sale of a new home to the same client in 1980, the exact amount of which was in dispute.[9] Holmes filed suit in superior court seeking to recover a share of the commission paid to the defendant in connection with these three transactions. The superior court, sitting without a jury, rendered judgment for the defendant on the ground that the requirements of General Statutes section 20-325a(b) were not met, in that the employment contract between the parties lacked the plaintiff's address.[10] The plaintiff appealed directly to the Connecticut Supreme Court,[11] which found error in the superior court's application of section 20-325a to the employment contract and ordered a new trial to consider the merits of the plaintiff's claim.[12]

Section 20-325a is essentially an extension of the statute of frauds and is characteristic of statutes that many states have enacted in an attempt to regulate contract formation in the real estate industry.[13] Unless a contrary legislative intent is apparent, most courts have interpreted the reach of such statutes to be limited to employment agreements between owners of real estate and their brokers[14] — commonly called "listing contracts."[15]

In *Revere Real Estate v. Cerato*,[16] the Connecticut Supreme Court held that a plaintiff-brokerage firm's right to recover commissions depended, *inter alia*, upon whether its listing contract with the defendant-seller contained the items enumerated in section 20-

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7. *Id.* at 810, 462 A.2d at 1058-59.

8. *Id.*

9. *Id.* at 810 n.4, 462 A.2d at 1059 n.4.

10. *Id.* at 811, 462 A.2d at 1059.

11. *Id.* at 809, 462 A.2d at 1058.

12. *Id.* at 813, 462 A.2d at 1060.

13. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-101 (1967); CAL. CIVIL CODE § 1624 (Deering 1971); N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978); MICH. COMP. LAWS ANN. § 566.132 (West 1967); WIS. STAT. ANN. § 240.10 (West 1957).

14. *E.g.*, Bush v. Mattingly, 62 Ariz. 483, 158 P.2d 665 (1945); Gorham v. Heiman, 90 Cal. 346, 27 P. 289 (1891); Clark v. Ward, 117 Ind. App. 307, 70 N.E.2d 755 (1947); Thompson v. Carey's Real Estate, 335 Mich. 474, 56 N.W.2d 255 (1953); Borisoff v. Schatten, 335 Mich. 684, 57 N.W.2d 430 (1953); Dura v. Walker, Hart and Co., 27 N.Y.2d 346, 267 N.E.2d 83 (1971); Connerton v. Andrews, 195 Wis. 433, 218 N.W. 817 (1928). *See supra* note 13 for statutes that were at issue in the above cases.

15. *See generally* D. BURKE, LAW OF REAL ESTATE BROKERS, pp. 38-49 (1982).

16. 186 Conn. 74, 438 A.2d 1202 (1982).

325a(b).[17] In *William Pitt, Inc. v. Taylor*,[18] the court declared that listing contracts were governed exclusively by section 20-325a and that a sales contract between a buyer and seller of real estate was beyond the scope of the statute.[19] The plaintiff in *Taylor* was a broker who brought action to recover a commission for procuring a ready, willing and able buyer.[20] The court held that the defendant-seller could not defend on the basis that he never signed the sales contract with the buyer because the sales contract was an undertaking "separate and apart from the listing agreement," to which the statute applied.[21]

The court in *Holmes* cited its decision in *Taylor* as implicitly rejecting the notion that all contracts relating to real estate must conform to section 20-325a.[22] Applying the *Taylor* analysis, the *Holmes* court concluded that the employment contract between the plaintiff and defendant was separate and apart from the listing agreement between the defendant and the landowner.[23] The court, however, did not rely solely on the *Taylor* rationale. It also found section 20-325a inapplicable to the employment contract based upon the wording of the statute itself. The court interpreted the word "commission" in section 20-325a as excluding compensation due from a real estate broker to a salesman-employee.[24] Because the plaintiff's cause of action arose out of the employment contract, the court reasoned that it was not an action to recover a commission under section 20-325a.[25]

The court's interpretation of the scope of section 20-325a in *Holmes* does not reflect a literal reading of the statute, for there is neither any wording explicitly limiting the statute's applicability to listing contracts nor is there any language purporting to define "commission." On the contrary, subsection (b) contains the phrase "no person" to describe who is precluded from bringing an action under the statute.[26] Courts in other states with similar statutes, however, have generally construed such broad wording to exclude agreements

17. *Id.* at 77, 438 A.2d at 1204.
18. 186 Conn. 82, 438 A.2d 1206 (1982).
19. *Id.* at 84, 438 A.2d at 1208.
20. *Id.* at 82-83, 438 A.2d at 1207-1208.
21. *Id.* at 84, 438 A.2d at 1208.
22. *Holmes*, 190 Conn. at 812, 462 A.2d at 1059.
23. *Id.*
24. *Id.* at 812-13, 462 A.2d at 1959-60.
25. *Id.* at 812, 462 A.2d at 1060.
26. CONN. GEN. STAT. ANN. § 20-325a(b) (West Supp. 1983-84), *see supra* note 2 for text of the statute.

between brokers, or agreements between brokers and their salesmen-employees, to share in commissions earned through their combined efforts.[27]

The Michigan Supreme Court has decided two cases involving an issue nearly identical to the one in *Holmes*. In *Thompson v. Carey's Real Estate*,[28] the plaintiff, a real estate salesman, brought an action against his employer, a real estate broker, for a commission allegedly due him under an oral employment contract.[29] The broker raised the statute of frauds in defense, the pertinent provisions of which bears close resemblance to 20-325a.[30] In holding that the statute did not apply to the employment agreement, the court emphasized the fact that the relationship between the parties was one of employer-employee.[31] It reasoned that since the validity of employment agreements in other contexts were not generally measured against the standards of the statute there was no reason, in the absence of any language to the contrary, to read into the statute a legislative intent to give special treatment to employment contracts between brokers and their salesmen.[32] The court in *Thompson* determined that the legislative purpose, in adopting the statute, was to protect real estate owners from unfounded claims by brokers for commission.[33] In *Borisoff v. Schatten*,[34] the Michigan Supreme Court, faced with the identical issue presented in *Thompson*, affirmed that decision and concluded that compensation due a real estate salesman from his broker-employer was not a "commission" within the contemplation of the statute.[35]

Unlike the Michigan court in *Thompson*, the Connecticut court in *Holmes* did not examine the peculiar nature of the employment relationship between a broker and his salesman, but nevertheless reached the same result as the Michigan court–that the compensa-

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27. *See supra* notes 13 and 14.

28. 335 Mich. 474, 56 N.W.2d 255 (1953).

29. *Id.* at 475, 56 N.W.2d at 256.

30. MICH. COMP. LAWS ANN. § 566.132 (West 1967) provides in part:

> In the following cases specified in this section, every agreement . . . shall be void, unless . . . in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say: 5. Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate . . .

31. *Thompson*, 335 Mich. at 476, 56 N.W.2d at 257.

32. *Id.* The employment agreements referred to were those contracts that were performable within one year.

33. *Id.*

34. 335 Mich. 684, 57 N.W.2d 430 (1953).

35. *Id.* at 686, 57 N.W.2d at 431.

tion due a salesman is not a "commission" under the statute—through a slightly different analysis.[36] The *Holmes* court ignored the obvious difference in wording used in the Michigan statute. Section 20-325a refers to ". . . any commission, compensation or other payment. . . ,"[37] while the statutory provision interpreted in the Michigan cases relied on by the Connecticut court only mentions "commissions."[38] It is not unreasonable to infer that by adding the phrase "compensation or other payment," the Connecticut legislature did not intend to limit the scope of 20-325a to contracts involving the payment of brokerage commissions by an owner of real estate.

The court in *Holmes*, however, failed to consider this alternative interpretation of 20-325a. Some courts have justified a broad application of such statutes either by construing such wording as "every agreement" or "no person" literally, or by interpreting "commission" liberally so as to encompass any compensation paid to a broker.[39] The courts that have adopted this approach have typically argued that had the legislature intended a narrower scope for these special statute of frauds provisions, it would have employed the appropriate limiting language.[40] Although a similar argument can be made with respect to the language of 20-325a,[41] the court in *Holmes* completely disregarded precedent representing the broader approach.

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36. *Holmes*, 190 Conn. at 812-13, 462 A.2d at 1059-60. *See supra* text accompanying notes 21-24 and 27-31.

37. CONN. GEN. STAT. ANN § 20-325a (West Supp. 1983-84), *see supra* note 2 for text of the statute.

38. MICH. COMP. LAWS ANN. § 566-132 (West 1967), *see supra* note 29 for portion of text of the statute.

39. *See, e.g.*, Cohen v. P.J. Spitz Co., 121 Ohio St. 1, 166 N.E. 804 (1929) (the court held that the provision of the Ohio statute stating, "[n]o action shall be brought . . . upon any agreement, promise or contract to pay any commission for or upon the sale of an interest in real estate . . . ," was applicable to an oral agreement between brokers to divide commission. *Id.* at 4-5, 166 N.E. at 805, (quoting GEN. CODE § 8621 (repealed)). The court asserted that the statutory wording was "clear and unambiguous," containing neither limitations nor exceptions, and that to construe the statute otherwise would nullify its plain purport.). *Id. See also* Smith v. Starke, 196 Mich. 311, 162 N.W. 998 (1917). The court in *Smith v. Starke* held that the word "commission" implies a compensation to a factor or other agent for services rendered in making a sale, and concluded that the compensation plaintiff-broker was to receive under his oral contract with defendant-broker was a commission within the meaning of the statute. The court further determined that since the statute stated "every agreement for the payment of a commission," it was not within the power of the court to read exceptions into the statute. *Id.* at 314-15, 162 N.W. at 999.

40. *See, e.g.*, Smith v. Starke, 196 Mich. 311, 162 N.W. 998 (1917).

41. *See supra* notes 25-26 and accompanying text.

The *Holmes* court concluded its analysis by determining that the contract between plaintiff and defendant was not for a commission "but for a division of the fruits of their joint efforts" which come to them from the owner in the shape of a commission.[42] In reaching this determination, the court in *Holmes* relied on *Dura v. Walker, Hart and Co.*,[43] in which the New York Court of Appeals held that the statute of frauds[44] did not apply to an agreement between two finders to share in a commission.[45] The New York court asserted that the purpose of the statute was to prevent fraudulent claims for commissions by business brokers and finders against employers, and not to prevent claims by one broker, or finder, against another.[46] The court reasoned that the plaintiff's theory of recovery was similar to that of a joint venture with its consequent fiduciary obligations, and that no writing was required for such agreements.[47] What the parties actually contracted for, the court concluded, was not the payment of a commission, but "a division of the fruits of their joint efforts" which had come to them from the owner in the shape of a commission.[48]

The court in *Holmes* may have misplaced its reliance upon *Dura* for its "joint efforts" analysis because the New York court based its interpretation of the scope of the New York statute[49] on express statements of legislative intent documented in the N.Y. Law Revision Commission's Report.[50] The Connecticut court was unable to point to any comparable legislative guidance.

The court's narrow construction of the scope of section 20-325a was also unsupported by the legislative history of the statute. Since its effective date, the Connecticut legislature has twice amended the language of section 20-325a and in neither instance did it attempt to clarify the ambiguous wording relating to the scope of the statute,[51]

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42. *Holmes*, 190 Conn. 808, 812-13, 462 A.2d 1057, 1060.

43. 27 N.Y.2d 346, 267 N.E.2d 83, 318 N.Y.S.2d 289 (1971).

44. N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978), *see supra* note 13 for text of the statute..

45. *Dura*, 27 N.Y.2d at 349, 267 N.E.2d at 84, 318 N.Y.S.2d at 291.

46. *Id.*

47. *Id.* at 351-52, 267 N.E.2d at 86, 318 N.Y.S.2d at 293.

48. *Id.*

49. N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978), *see supra* note 13 for text of the statute.

50. *Dura*, 27 N.Y.2d at 349-50, 267 N.E.2d at 84-85, 318 N.Y.S.2d at 291 (citing 1949 report of N.Y. LAW REV. COMM., N.Y. LEGIS. DOC. NO. 65(G), 615 (1949)).

51. CONN. GEN. STAT. § 20-325a (1983) (1972 P.A. 175, deleted from three places in the first sentence, the word "such" following the words "no," "or bring any" and "respect of any." 1973 P.A. 73-29 amended the first sentence of subsection (b) by in-

despite the significant amount of litigation in other states over the ambiguity of similar statutes.[52]

The *Holmes* decision is also vulnerable to attack on policy grounds. The evil sought to be avoided by statute of frauds provisions such as 20-325a is financial harm resulting from fraud or misrepresentation by dishonest real estate brokers. This objective is potentially compromised by adherence to a rule which in practical effect condemns fraudulent practices by brokers in their transactions with landowner-clients, and yet permits such abuses in the context of broker-salesman employment relationships. A narrow construction of a statute which could reasonably be read as extending to broker-salesman transactions, arguably reflects a weak or ambivalent judicial and legislative concern over the extent of the problem or the need to enact regulatory measures to control it. Furthermore, the *Holmes* decision leaves the door open to fraudulent dealings between brokers and their salesmen which potentially creates problems of as great a magnitude as those created by brokers and sellers.[53]

The court's ruling in *Holmes*, however, is not surprising in light of both its prior treatment of 20-325a in *Cerato* and *Taylor*, and the factual similarity between *Holmes* and the two Michigan cases relied upon by the court.[54] The soundness of the court's analysis in reaching its result, however, is called into question for the following reasons: first, the court failed to initially examine the express wording of section 20-325a and any relevant legislative history in attempting to discern how broadly the legislature intended that the statute was to operate; second, the court refused to point out and reconcile not only those cases that have held statutes similar to 20-325a applicable to broker-salesman employment agreements, but also the distinguishable facts of the cases upon which it relied;[55] and finally, there

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serting "licensed under this chapter" following "no person" and by inserting "as set forth in subsection (a)" following "rendered after October 1, 1971.").

52. *See*, *e.g.*, cases cited *supra* notes 14 and 37.

53. *See* Dura v. Walker, Hart & Co., 27 N.Y.2d 346, 351, 267 N.E.2d 83, 85, 318 N.Y.S.2d 289, 292 (1971).

54. *Holmes*, 190 Conn. at 813, 462 A.2d at 1060. *See supra* notes 27-34 and accompanying text.

55. One such factual distinction was the different wording in the Michigan statute. *See supra* notes 35-36 and accompanying text. In addition, every case relied upon by the *Holmes* court involved the enforceability of an *oral* agreement of employment, while the employment agreement in the present case was written. In this regard, it is interesting to note that the defendant produced the written contract, of which the plaintiff had no recollection, during the course of the trial. This tactic leads one to wonder whether the defendant was attempting to preserve a possible ground for distinguishing such cases as *Cohen v. P.J. Spitz Co.*, 121 Ohio St. 1, 166 N.E. 804 (1929) and *Smith v. Starke*, 196

is an implicit inconsistency between the court's decision and the public policy against fraudulent dealings by dishonest real estate brokers.

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Mich. 311, 162 N.W. 998 (1917), discussed in note 39 *supra*, in the event the court adopted the approach advanced in those cases.